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No. 09-1274
Capital Case

Supreme Court, U.S.
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In The
Supreme Court of the United States

REGINALD CLEMONS, et al.,
Petitioners,

v.

LARRY CRAWFORD, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF THE CASE 1
Procedural History 1
Missouri's Protocol 2
ARGUMENT 5
CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Baze v. Rees, 553 U.S. 35 (2008) 2, 4, 5, 6, 7, 8, 11, 12, 14
Clemons v. Crawford, 585 F.3d 1119 (8th Cir. 2009) 11
Cooey v. Strickland, 589 F.3d 210 (6th Cir. 2009) 11, 13
Emmett v. Johnson, 532 F.3d 291 (4th Cir. 2008) 11
Gregg v. Georgia, 429 U.S. 875 (1976) 13
Jackson v. Danberg, 594 F.3d 210 (3rd Cir. 2010) 11, 12
Jackson v. Danberg, 601 F.Supp.2d 589 (D. Del. 2009) 12
Jones v. Bradshaw, No. 07-3766 (6th Cir. Jan. 30, 2009) 12, 13, 14
Raby v. Livingston, (5th Cir. Mar. 15, 2010) 12
Reynolds v. Strickland, 583 F.3d 956 (6th Cir. 2009) 12, 13
Schwab v. State, 995 So.2d 922 (Fla. 2008) 11
Taylor v. Crawford, 487 F.3d 1072, 1085 (8th Cir. 2007), *cert. denied*, 128 S.Ct. 2047 (2008) 4, 6, 13

STATEMENT OF THE CASE

Procedural History

Four petitioners, Reginald Clemons, Richard Clay, Jeffrey Ferguson, and Roderick Nunley, Missouri prisoners with death sentences, filed this action in the United States District Court for the Western District of Missouri on July 9, 2007 (App. to Pet. -- hereinafter App. -- page 68a). Petitioners named as defendants Larry Crawford, former Director of the Missouri Department of Corrections; James Purkett, former Superintendent of the Eastern Reception Diagnostic and Correctional Center; and Terry Moore, former Director of the Division of Adult Institutions (App. 34a). Also named as defendants were John Does 1-50, identified as unknown persons who will participate in the offenders' execution, but no Does have since been identified or served. Four additional petitioners, Michael Taylor, Martin Link, Mark Christeson, and William Roussan, were joined as plaintiffs during the course of the litigation. Three petitioners, John Middleton, Russell Bucklew, and Earl Ringo, were denied leave to intervene in the litigation by the district court (App. 3a).

The complaint claimed that Missouri's implementation of its method of execution was unconstitutional because of the risk that the lethal chemicals may be improperly prepared or administered by unqualified and untrained personnel (App. 58a). Petitioners prayed for a declaration that the lethal injection procedure violated the Eighth and Fourteenth Amendments, and they prayed for the court's order permanently

enjoining Missouri from conducting executions under the written protocol and enjoining Missouri from employing untrained, unqualified, or unfit personnel to discharge the medical responsibilities involved with lethal injection (App. 63a). Following this Court's opinion in *Baze v. Rees*, 553 U.S. 35 (2008), Missouri moved for judgment on the pleadings because Missouri's written lethal injection protocol (attached to the complaint as Exhibit A (App. 67a-71a)) provided more stringent safeguards against the risk of pain than did the Kentucky protocol that had just been upheld in *Baze*. In its July 15, 2008 order, the district court compared Missouri's protocol with the Kentucky protocol and found the qualifications of the medical personnel comparable (App. 23a-24a). The court of appeals affirmed the judgment of the district court (App. 1a) and denied rehearing en banc (App. 32a).

Missouri's Protocol

In Missouri, as in Kentucky, execution of a death sentence is carried out by the successive administration of three chemicals: thiopental renders the prisoner unconscious; pancuronium bromide renders the prisoner unable to move; and potassium chloride causes the prisoner's heart to stop (App. 5a-6a).

Missouri's lethal injection protocol requires a physician, nurse, or pharmacist to prepare the chemicals used during the lethal injection (App. 68a). A physician, nurse, or emergency medical technician (EMT) who has appropriate training, education, and experience in the setting of intravenous lines (IVs) sets the IVs into the condemned, monitors the condemned, and supervises the injection of lethal

chemicals by the members of the execution team (App. 68a-70a). Both primary and back-up IVs are set (App. 69a).

The protocol requires administration of five grams of thiopental in 200 ccs (cubic centimeters) of solution, a 30 cc saline flush, 60 mg of pancuronium bromide in 60 cc solution, a 30 cc flush, 240 miliequivalents of potassium chloride, followed by a 60 cc flush (App. 68a). A second set of syringes containing an additional five grams of thiopental is prepared for use in the unlikely event the condemned prisoner is still conscious after receiving the initial five grams of the chemical (App. 69a). The protocol sets out procedures to document the chemicals used during the execution process (App. 71a).

Following administration of the thiopental, a medical professional (physician, nurse, or EMT) enters the execution chamber to inspect the IV site (App. 70a). The medical professional uses standard clinical techniques to assess consciousness, such as checking for movement, opened eyes, eyelash reflex, pupillary responses or diameters, and response to verbal commands and physical stimuli (App. 70a). In the unlikely event the condemned is still conscious, the additional five grams of thiopental are injected, and the medical professional then examines the condemned again (App. 70a). Once the condemned is unconscious and three minutes have elapsed from the injection of thiopental, the remaining chemicals are injected (App. 70a). If the condemned's heart does not cease activity within five minutes, then additional potassium chloride is injected (App. 70a). When electrical activity of the heart ceases, medical personnel pronounce death (App. 70a).

The court of appeals upheld the constitutionality of Missouri's lethal injection procedure in *Taylor v. Crawford*, 487 F.3d 1072, 1085 (8th Cir. 2007), *cert. denied*, 128 S.Ct. 2047 (2008). Missouri's procedure is substantially similar to Kentucky's procedure that this Court upheld in *Baze* (App. 10a-14a; 23a-25a).

ARGUMENT

This appeal in large part reduces to this question: Whether it is cruel and unusual punishment for a state to carry out an execution by means of a judicially approved lethal injection protocol that requires licensed and experienced medical personnel to: (1) prepare the lethal chemicals; (2) set the IVs through with which the lethal chemicals are administered; (3) observe the injection of the lethal chemicals into the IV lines; and (4) enter the execution chamber after administration of the first chemical (thiopental) which causes unconsciousness, to check the IV site for any problems and to examine the condemned prisoner to confirm that he is unconscious and thereby, insensate to any pain that the second and third chemicals could cause to a conscious person. Under *Baze v. Rees*, where safeguards such as these are incorporated into a lethal injection procedure, that procedure is constitutional as a matter of law. Any factual challenge to the particular qualifications and training of execution personnel is not material to the legal conclusion whether the lethal injection procedure violates the Eighth Amendment.

The court below examined petitioners' complaint (App. 34a) in detail. In essence, petitioners alleged that Missouri would violate their Eighth Amendment rights because Missouri's execution protocol would be implemented by incompetent or unfit medical personnel. Petitioners theorized that because the Department of Corrections has used unfit medical personnel in the

past,[1] it will use unfit medical personnel in the future (Petition, pages 20-22).[2] In resolving petitioners' claim, the court below relied on two decisions: *Baze v. Rees*, and *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007). From *Baze*, the court below identified the legal standard by which to judge the complaint as follows:

> "[T]he constitution does not demand the avoidance of all risks of pain in carrying out executions." [*Baze*, 128 S.Ct. at 1529]. Instead, to establish an Eighth Amendment violation, "the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering' and give rise to

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[1] Since the filing of the lawsuit, the named respondents are no longer in their positions. Moreover, the executive with responsibility over the Missouri Department of Corrections, the Missouri Governor, has also changed. And, Dr. Doe, the prior complained-of doctor, is no longer involved with Missouri executions (App. 15A). There are no allegations in the complaint that the alleged bad decisions were somehow institutional as compared to individual.

[2] Of course, the premise of this contention was rejected in the Eighth Circuit's 2007 *Taylor* decision. Not only was Dr. Doe no longer participating in the protocol, but when he participated previously, he had still given a large dose of thiopental, almost ten times the amount needed for surgery (App. 4a n.5 quoting *Taylor*, 487 F.3d at 1076). There was no evidence that any Missouri condemned had suffered any unnecessary pain (App. 4a n.6).

> 'sufficiently *imminent* dangers.'" *Id.* at 1530-31 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34 (1993)). "[T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 1531 (quoting *Farmer v. Brennon*, 511 U.S. 825, 842, and 846 n.9 (1994)).

(App. 9a).[3]

After identifying the legal standards set forth in *Baze* (App. 9a), the court discussed this Court's application of that standard to the facts in *Baze* (App. 10a-12a). In *Baze*, there was no substantial risk of serious harm from allowing non-medical personnel to mix thiopental because it was a simple process to mix (App. 10a). There was no substantial risk of harm due to problems related to the IV line because of safeguards implemented by Kentucky's protocol: Members of the IV team must have at least one year of professional experience such as a certified medical assistance, phlebotomist, EMT, paramedic or military corpsman (App. 11a quoting 128 S.Ct. at 1533). And setting a back-up IV line, a consciousness check by the Warden and Deputy Warden, and an IV check combined to lower the risk

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[3] Petitioners do not suggest that the court below used a legal standard other than that adopted in *Baze* (Petition, pages 23-24). Petitioners' only contention is that the court below misapplied *Baze*, not that the *Baze* framework should be revisited.

of maladministration to a point where it could not "remotely be characterized as 'objectively intolerable.'" (App. 12a quoting *Baze*, 128 S.Ct. at 1537.

Following the teachings of this Court, the court below examined Missouri's protocol. Unlike Kentucky, in Missouri a physician, nurse, or pharmacist prepares the thiopental (App. 12a). Medical personnel watch the condemned for signs of IV problems (App. 12a). Medical personnel enter the execution chamber to check for signs of consciousness (App. 12a). A physician, nurse, or EMT with appropriate training, education, and experience sets the IV (App. 12a). A back-up IV is set as well (App. 12a). An additional five grams of thiopental is prepared in the unlikely event the prisoner is still conscious after receiving the first dose (App. 12a). The medical personnel do not have the discretion to vary the amount of the chemicals without prior approval from the Director of the Department of Corrections (App. 12a-13a).

Petitioners contend that the complaint was sufficient to withstand judgment on the pleadings, even after *Baze* (Petition, pages 18-23). Petitioners reason that there is a substantial risk of serious harm because Missouri employs "incompetent personnel to carry out executions"[4] (Petition, pages

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[4] As the court of appeals noted, petitioners did not (and does not in the petition) define the terms "competent" or "incompetent" in any meaningful fashion (App. 13a n.7). That failure to define the terms is perhaps intentional so that petitioners or

18-19). Petitioners' theory is that Missouri formerly used a person petitioners deem incompetent; therefore, Missouri will always hire incompetent personnel (Petition, page 19).

That theory fails for at least four reasons set out by the court of appeals. First, petitioners made no factual allegations suggesting "incompetence, lack of necessary qualifications, or inadequate training on the part of any current or prospective member of Missouri's execution team" (App. 14a-15a). In their petition, petitioners do not disagree with this conclusion. Second, the complaint did not allege that any current or prospective member of the execution team "would intentionally or unintentionally deviate or ignore the written protocol." (App. 15a). Again, petitioners do not contend that this conclusion is erroneous (Petition, pages 18-23). Third, petitioners' criticism of the previous execution team leader, Dr. Doe (Petition, page 19), is unavailing because Dr. Doe "no longer participates in executions in Missouri" (App. 15a). And the cause of the alleged problems, an unwritten protocol, is no longer exists (App. 15a). The protocol is now in writing (App. 68a-71a).

Further, the court of appeals concluded that even if Dr. Doe were labeled as incompetent, that "does not support an inference any member of Missouri's current execution team is 'incompetent' or 'unqualified.'" (App. 15a). Simply put, past performance does not guarantee future results. That is particularly true where those on whom petitioners

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others can argue in subsequent suits that current or future medical personnel are not competent.

blame past hiring no longer serve in their roles with the Department. *See* note 1, *supra*.

And as noted by the court of appeals (App. 12a-13a), the Missouri written protocol has safeguards to prevent needless suffering. Most notable here, licensed medical professionals prepare the chemicals, set the IV's and oversee the injection of the chemicals. Because these individuals are licensed to provide their services to the general public, they should not be said to be unqualified to provide services at an execution. This is true regardless of details of their background, including where they may have gone to school, what their grades were, whether they have published papers, where they have been employed, what their professional responsibilities might have been, whether they have been sued for malpractice before, whether they have been professionally disciplined before, or whether they have a criminal history. Missouri medical team members are all currently licensed in their respective professions and experienced in the use of IV's.

The court of appeals identified an additional safeguard. If there were a problem with the preparation or administration of the thiopental that resulted in the prisoner's not losing consciousness, Missouri's protocol suspends the execution. After the injection of the thiopental, a licensed medical person enters the execution chamber to ensure that the IV is working properly and to administer standard techniques to confirm that the prisoner is unconscious before the injection of the second and third chemicals begins. This direct assessment of the IV site and the prisoner after administration of the thiopental is a fail safe that will protect the offender

from an objectively intolerable risk of unnecessary and wanton pain.

Petitioners suggest that the court of appeals' decision immunizes states from Eighth Amendment scrutiny (Petition, page 23). The court of appeals rightly rejected that assertion (App. 16a-17a). The lower court stated that *Baze* did not prohibit review of a lethal injection protocol (App. 16a). Instead, the district court and the court of appeals merely held that the complaint before it was properly resolved as a matter of law (App. 17a). A complaint could present allegations allowing factual development, but this one did not (App. 17a).

The essence of petitioners' allegation is that improper past practices support an inference that the current execution team is "incompetent." (Petition, page 22). The court of appeals rejected that inference. "The mere allegation Missouri employed an 'incompetent' and 'unqualified' individual in the past simply does not support the prisoner's allegation Missouri will employ 'incompetent' and 'unqualified' personnel in the future" (App. 15a). This conclusion is consistent with these of other courts that have reviewed this type of allegation. Recently, the Court of Appeals for the Third Circuit reviewed claims concerning Delaware's protocol and catalogued the cases upholding lethal injection even though there was allegedly a mistake in its administration at some earlier point. *Jackson v. Danberg*, 594 F.3d 210, 225-26 (3rd Cir. 2010) citing *Cooey v. Strickland*, 589 F.3d 210, 224 (6th Cir. 2009); *Clemons v. Crawford*, 585 F.3d 1119, 1127 (8th Cir. 2009); *Emmett v. Johnson*, 532 F.3d 291, 307 (4th Cir. 2008); *Schwab v. State*, 995 So.2d 922, 926-28 (Fla. 2008) (per curiam). These decisions are consistent

with this Court's statement in *Baze* that a single instance of mistake does not suffice to demonstrate a substantial risk of serious harm. 128 S.Ct. at 1531.

Petitioners seem to contend that there is some split of authority among the lower courts concerning application of *Baze* at the pleading stage (Petition, pages 25-29). Petitioners do not refer the Court to a case with a different result, a federal court of appeals reversing the grant of judgment on the pleadings (Petition, pages 25-29). There is no split of authority on the topic.

Petitioners confirm that the state's position has support elsewhere, citing *Raby v. Livingston*, 2010 WL 909097 (5th Cir. Mar. 15, 2010) (Petition, pages 25-26). Along with *Raby*, petitioners could have listed *Jackson v. Danberg*, 594 F.3d at 210. In *Jackson*, Delaware revised its lethal injection protocol and immediately moved for summary judgment on the theory that its protocol was substantially similar to the one this Court found constitutional in *Baze*. *Id.* at 214. The district court rejected the offender's invitation to "assume that future conduct by different personnel under a new lethal injection protocol in a different legal environment will reflect past conduct by former personnel under a now rejected protocol." *Id.* at 215 quoting *Jackson v. Danberg*, 601 F.Supp.2d 589, 598 (D. Del. 2009).

To show an alleged split, petitioners refer the Court to two Sixth Circuit decisions: *Reynolds v. Strickland*, 583 F.3d 956 (6th Cir. 2009) and *Jones v. Bradshaw*, No. 07-3766 (6th Cir. Jan. 30, 2009) (Petition, pages 26-27).

As to *Reynolds*, petitioners acknowledge that it is a stay-of-execution case (Petition, page 26) that would involve a four factor test. *See Cooey v. Strickland*, 589 F.3d 210, 218 (6th Cir. 2009) (listing stay factors in Sixth Circuit). The appellate court in *Reynolds* rejected Ohio's statute-of-limitations defense to the section 1983 suit. 583 F.3d at 956-57. The court of appeals went on and issued the stay of execution for what seemed to be public interest reasons without discussing the merits. *Id.* at 957. There is no holding in *Reynolds* that conflicts with the decision of the court below.

Further, the facts in *Reynolds* differ from those here. Ohio had "revised its execution protocol in May, 2009 and experienced serious and troubling difficulties in executing at least three inmates." *Id.* at 957. In contrast, Missouri has adopted a written protocol -- at the order of a federal district court (App. 5a). And before the adoption of the written protocol, "there was not a scintilla of evidence that any prisoner ever suffered any pain other than what was necessary to acquire access to the prisoner's circulatory system through the insertion of the needed intravenous lines." (App. 4a n.6, quoting *Taylor v. Crawford*, 487 F.3d at 1075).

Petitioners also fail to show that *Jones v. Brandshaw* is inconsistent with the decision of the court below. Petitioners refer the court to page 844 of the district court opinion (Petition, page 27 citing *Jones*, 489 F.Supp.2d at 844). On this page, there is, *inter alia*, a generic allegation that the death penalty violates the Eighth Amendment prohibition against cruel and unusual punishment, which the district court rejected on the basis of *Gregg v. Georgia*, 429 U.S. 875 (1976). In the Sixth Circuit order of

January 30, 2009, the cause was remanded "for limited discovery and factual development of the lethal injection issue." *Jones v. Bradshaw*, No. 07-3766 (6th Cir. Jan. 30, 2009). Assuming "the lethal injection issue" is the same as the one in the current case, it is significant that Ohio did not oppose a remand. If Ohio conceded that the allegations were sufficient, then the January 30, 2009 order from the Sixth Circuit is unsurprising. In contrast, Missouri has not conceded, and to the contrary, the court below has determined that the allegations in the complaint are insufficient. The two paragraph order in *Jones* fails to demonstrate divergent authority.

Finally, petitioners suggest that federal district courts have had divergent results in their application of *Baze* (Petition, pages 27-29). Assuming that suggestion is true, resolution of that divergent authority is a matter best left for the courts of appeals. This Court should not exercise its discretionary review to resolve a controversy that, in the end, may not exist. This is manifested in Rules 10(a) and 10(c) where the Court indicates that its decision on certiorari review is informed by divergence between federal courts of appeals and state high courts, not state and federal trial courts.

CONCLUSION

Respondent respectfully requests the Court deny the petition for writ of certiorari.

Respectfully submitted,

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